MMC 4200: Law of Mass Communications v1

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Instructor • Spring 2026
Class: Pugh 170 on Tuesdays at 11:45-12:35 and Thursdays at 11:45-1:40
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Course Summary

This course is an introduction to communication law with an emphasis on how the law applies to media professionals- journalists, broadcasters, YouTubers, marketers, communications strategists, etc. Some having called this course "how to not get sued: a primer for media professionals." As future journalists and media practitioners, the laws that regulate speech, protest, privacy, copyright, and access to public records have a very real and direct effect on the way the information industry works.

Once you have completed this course, you should be able to "issue spot" the potential legal risks involved in reporting, producing, or distributing content. You will be able to explain where media outlets have clear legal rights and protections, and where they have legal obligations. And just as importantly, you will be able to spot some of the gray zones and "hard" cases, where the law is uncertain.

Some specific topics of discussion include:

- How the U.S. legal system works
- Free speech theory
- First Amendment levels of scrutiny
- Protected and unprotected speech
- Defamation
- Privacy torts and other privacy laws
- Open records and government access
- Copyright
- Regulations on advertising
- Emerging issues of digital media and the Internet

Course Objectives

- Demonstrate the ability to understand a case opinion.
- Summarize the theory of free speech and its role in a democracy and pluralist society.
- Describe the most important legal rules related to defamation, privacy, open records, copyright, advertising, and digital platforms.
- Apply these legal rules to new facts and scenarios.

These learning outcomes will be assessed through exams and group assignments throughout the semester.

Format

The class is designed for in-person engagement. Class time will be highly interactive. I will go over the readings, drawing out the content that I consider most important and test-worthy, using a series of questions and hypotheticals.

The Canvas page will be our information hub. I will make announcements there, and you will take exams and upload final projects through it. Make sure you have alerts on and check the site regularly.

Textbook

The required textbook for our class is:

Mass Media Law (22nd Edition) by Clay Calvert, Derigan Silver, and Dan V. Kozlowski (ISBN: 978-1260837421)

Additional readings are attached to this syllabus.

Some additional resources you might find helpful include:

Reporter's Committee for Freedom of the Press: http://www.rcfp.org/RCFP

Florida Sunshine Law Manual (from the Attorney General): http://www.myflsunshine.com/

Florida First Amendment Foundation: https://floridafaf.org/

The Electronic Frontier Foundation: https://www.eff.org/

The Volokh Conspiracy: https://reason.com/volokh/

The Technology and Marketing Law Blog: https://blog.ericgoldman.org/

Grades

The course grade is based on three exams, one public records exercise, one blog post, and attendance/participation points.

Item	Percent
Exam 1	25%
Exam 2	25%
Exam 3	25%
Public Records Exercise	10%
Blog Post	10%
Attendance/Participation	5%

Grading scale

A: 90 – 100%
B: 80 – 89%
C: 70 – 79%
D: 60 – 69%
F: 0 – 59%

Through the semester, *four* exams will be administered, and I will drop your lowest score at the end. If you have over a 90% total grade going into the final week, you do not need to take the final exam. There will also be at least one opportunity for extra credit based on attendance at relevant events. Attending one of these events will allow you to boost your lowest exam grade by five percentage points.

Exams

Exams will consist of multiple-choice questions and will take place online. We will do many questions throughout class that are in the style of my exam questions. All exams will be based on readings and lectures. Make-up exams will be given only by prior arrangement or with documentation of an excused absence as defined by the University of Florida.

Participation

Attendance will be recorded through occasional in-person ungraded quizzes.

Technical Support

Call 352-392-HELP (4357) for help resolving computer-related and other technical issues related to accessing or using Canvas, connectivity (wireless, VPN), email or software configuration, and browser and GatorLink authentication issues. Any requests for make-up consideration due to technical issues should be accompanied by the ticket number received from the Help Desk when the problem was reported to them. The ticket number will document the time and date of the problem. You should e-mail your instructor within 24 hours of the technical difficulty if requesting make-up consideration.

UF Computing Help Desk: https://helpdesk.ufl.edu or helpdesk@ufl.edu
Walk-In Support: HUB 132

Students With Disabilities

Reasonable accommodations will be made for students with disabilities and who have registered with the UF Dean of Students Office. This office will provide relative documentation to the student, who must then provide this documentation to the instructor when requesting accommodations.

UF Disability Resource Center: http://www.dso.ufl.edu/drc/

I will be using universal testing time so that students will not need to request additional testing time. Specifically, I will administer tests on Thursdays (when class meets for nearly two hours), and you will have the entire class period to complete the multiple choice exam even though it is designed to take approximately 30 minutes.

Counseling Center

Personal or health issues such as depression, anxiety, stress, career uncertainty and or relationships can interfere with your ability to function as a student. UF's Counseling and Wellness Center (CWC) offers support for students in need. CWC is located at 3190 Radio Road and open each weekday from 8 to 5.

UF Counseling and Wellness Center: http://www.counseling.ufl.edu/cwc

UF Resources

UF students have access to tutorials (video-based and otherwise) from which to learn – outside of class time – certain software and equipment needed to accomplish various required tasks this semester. These resources include but are not limited to the library, tutoring, career resource center, etc.

UF Student Resources: http://ufadvising.ufl.edu/student-resources.aspx

Course Evaluations

At the end of the semester, please offer feedback on the quality of the course instruction via GatorEvals.

Guidance on all things GatorEvals: https://gatorevals.aa.ufl.edu/students
Evaluation results: https://gatorevals.aa.ufl.edu/public-results.

Attendance, Attention, Deadlines and Academic Integrity

Attendance and Lateness

Students are responsible for satisfying all academic objectives as defined by the instructor and in this syllabus. You may have three unexplained absences without losing attendance credit. Any more than three requires an explanation.

If you know you will be absent but don't want to miss the material, let me know in advance and I will record the class. However, as this is an in-person course, students watching the recording will not get credit for the participation quizzes.

UF Attendance Policies:
https://catalog.ufl.edu/ugrad/current/regulations/info/attendance.aspx

Mobile Devices

Mobile devices must be out of sight and unused during class unless I have directed you to use them for a particular class activity. Do not check text messages, social media, email, etc., during class.

Academic Integrity

Academic dishonesty of any kind will not be tolerated in this course, and it will eat at your soul. Don't do it. Academic dishonesty includes copying any work done by another person and submitting it for a class assignment or test answer. Dishonesty also includes using the in-person attendance quiz code and taking the quiz when you are not actually present in class.

UF Student Honor Code: https://sccr.dso.ufl.edu/process/student-conduct-code/

Artificial Intelligence: Remember that submitting any work that is not your own, including work generated by ChatGPT or other AI programs, is still considered academic dishonesty unless the instructor has specifically allowed or required you to use AI. The university and its faculty is monitoring AI and its use in the academic environment and new policies may arise to adapt to this changing communication environment.

In this course, you are invited to use AI for research purposes. You may not use it (or any Internet sources) during exams.

Content Warning

Any course that delves into free speech law will be punctuated with harsh language, offensive content, and excesses that go beyond the bounds of good taste. The purpose of including and discussing this content is to illustrate the operation of the law.

Course Schedule

This schedule is subject to change

Week 1 **Introduction to the American Legal System**	**Tues:** Syllabus review, Mass Media Law (MML) pages 1-37, and *Weirum* (below) **Thurs:** *Hustler* (below)
Week 2 **Introducing the First Amendment**	**Tues:** MML pages 58-85 **Thurs:** *Brown* (below)
Week 3 **Schools, Forum Analysis, and Time, Place & Manner**	**Tues:** MML pages 88-100 **Thurs:** MML pages 116-134; *Pernell v. Florida Board of Governors of the State University System* (below)
Week 4 **Categories of Unprotected Speech**	**Tues:** MML pages 134-157 **Thurs: EXAM 1** (administered during class, covering material from Weeks 1-4)
Week 5 **Defamation: the elements**	**Tues:** MML pages 160-192 **Thurs:** *Sandmann* (below)
Week 6 **Defamation: First Amendment and Privileges**	**Tues:** MML pages 195-227, *Sullivan* (below) **Thurs:** MML pages 233-264
Week 7 **Section 230 and Platforms**	**Tues:** *Zeran* (below) **Thurs:** No new reading. (Prof. Bambauer will lecture on several recent Supreme Court cases related to social media platforms.)
Week 8 **Defamation Privileges**	**Tues:** *TikTok v. Eighth Judicial District of Nevada* **Thurs: Exam 2** (administered during class, covering material from weeks 5-8)

Week 9 **FOIA**	**Tues:** MML pages 346-387 [FOIA activity with special guest Dave Cuillier] **Thurs:** No new reading
Spring Break	**NO CLASS**
Week 10 **Privacy and Right of Publicity**	**Tues:** MML pages 268-312 **Thurs:** MML pages 315-333
Week 11 **False Light and Copyright**	**Tues:** MML pages 333-343 **Thurs:** MML pages 544-582
Week 12 **Advertising**	**Tues:** MML pages 603-619 **Thurs:** MML pages 630-652
Week 13 (April 15 and 17)	**Tues:** Catch Up / Review **Thurs: Exam 3** (administered during class, covering material from weeks 9-13)
Week 14 (April 22)	**Tues:** Blog Post Party
FINAL	**Exam 4 will be administered during the final exam period. It will cover material from the entire course.**

Readings

Week 1

Weirum v. RKO General
15 Cal.3d 40 (Cal. 1975)

MOSK, J.

A rock radio station with an extensive teenage audience conducted a contest which rewarded the first contestant to locate a peripatetic disc jockey. Two minors driving in separate automobiles attempted to follow the disc jockey's automobile to its next stop. In the course of their pursuit, one of the minors negligently forced a car off the highway, killing its sole occupant. In a suit filed by the surviving wife and children of the decedent, the jury rendered a verdict against the radio station. We now must determine whether the station owed decedent a duty of due care.

The facts are not disputed. Radio station KHJ is a successful Los Angeles broadcaster with a large teenage following. At the time of the accident, KHJ commanded a 48 percent plurality of the teenage audience in the Los Angeles area. In contrast, its nearest rival during the same period was able to capture only 13 percent of the teenage listeners. In order to attract an even larger portion of the available audience and thus increase advertising revenue, KHJ inaugurated in July of 1970 a promotion entitled "The Super Summer Spectacular." The "spectacular," with a budget of approximately $40,000 for the month, was specifically designed to make the radio station "more exciting." Among the programs included in the "spectacular" was a contest broadcast on July 16, 1970, the date of the accident.

On that day, Donald Steele Revert, known professionally as "The Real Don Steele," a KHJ disc jockey and television personality, traveled in a conspicuous red automobile to a number of locations in the Los Angeles metropolitan area. Periodically, he apprised KHJ of his whereabouts and his intended destination, and the station broadcast the information to its listeners. The first person to physically locate Steele and fulfill a specified condition received a cash prize. In addition, the winning contestant participated in a brief interview on the air with "The Real Don Steele."

In Van Nuys, 17-year-old Robert Sentner was listening to KHJ in his car while searching for "The Real Don Steele." Upon hearing that "The Real Don Steele" was proceeding to Canoga Park, he immediately drove to that vicinity. Meanwhile, in Northridge, 19-year-old Marsha Baime heard and responded to the same information. Both of them arrived at the Holiday Theater in Canoga Park to find that someone had already claimed the prize. Without knowledge of the other, each decided to follow the Steele vehicle to its next stop and thus be the first to arrive when the next contest question or condition was announced.

For the next few miles the Sentner and Baime cars jockeyed for position closest to the Steele vehicle, reaching speeds up to 80 miles an hour. About a mile and a half from the Westlake offramp the two teenagers heard the following broadcast: "11:13 — The Real Don Steele with bread is heading for Thousand Oaks to give it away. Keep listening to KHJ.... The Real Don Steele out on the highway — with bread to give away — be on the lookout, he may stop in Thousand Oaks and may stop along the way.... Looks like it may be a good stop Steele — drop some bread to those folks."

The Steele vehicle left the freeway at the Westlake offramp. Either Baime or Sentner, in attempting to follow, forced decedent's car onto the center divider, where it overturned. Baime stopped to report the accident. Sentner, after pausing momentarily to relate the tragedy to a passing peace officer, continued to pursue Steele, successfully located him and collected a cash prize.

[Decedent's wife and children brought an action for wrongful death against the radio station, in addition to the teenaged drivers, and won a jury verdict. This appeal followed.]

The primary question for our determination is whether defendant owed a duty to decedent arising out of its broadcast of the giveaway contest. The determination of duty is primarily a question of law. (*Amaya* v. *Home Ice, Fuel & Supply Co.* (1963) 59 Cal.2d 295, 307 [29 Cal. Rptr. 33, 379 P.2d 513] (overruled on other grounds in *Dillon* v. *Legg* (1968) 68 Cal.2d 728, 748 [69 Cal. Rptr. 72, 441 P.2d 912, 29 A.L.R.3d 1316]).) It is the court's "expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (Prosser, Law of Torts (4th

ed. 1971) pp. 325-326.) Any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall. (Prosser, *Palsgraf Revisited* (1953) 52 Mich.L.Rev. 1, 15.) While the question whether one owes a duty to another must be decided on a case-by-case basis, every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct. (*Hilyar* v. *Union Ice Co.* (1955) 45 Cal.2d 30, 36 [286 P.2d 21].) However, foreseeability of the risk is a primary consideration in establishing the element of duty. (*Dillon* v. *Legg, supra,* 68 Cal.2d 728, 739.) Defendant asserts that the record here does not support a conclusion that a risk of harm to decedent was foreseeable.

We conclude that the record amply supports the finding of foreseeability. These tragic events unfolded in the middle of a Los Angeles summer, a time when young people were free from the constraints of school and responsive to relief from vacation tedium. Seeking to attract new listeners, KHJ devised an "exciting" promotion. Money and a small measure of momentary notoriety awaited the swiftest response. It was foreseeable that defendant's youthful listeners, finding the prize had eluded them at one location, would race to arrive first at the next site and in their haste would disregard the demands of highway safety.

Indeed, "The Real Don Steele" testified that he had in the past noticed vehicles following him from location to location. He was further aware that the same contestants sometimes appeared at consecutive stops. This knowledge is not rendered irrelevant, as defendant suggests, by the absence of any prior injury. Such an argument confuses foreseeability with hindsight, and amounts to a contention that the injuries of the first victim are not compensable. "The mere fact that a particular kind of an accident has not happened before does not ... show that such accident is one which might not reasonably have been anticipated." (*Ridley* v. *Grifall Trucking Co.* (1955) 136 Cal. App.2d 682, 686 [289 P.2d 31].) Thus, the fortuitous absence of prior injury does not justify relieving defendant from responsibility for the foreseeable consequences of its acts.

It is of no consequence that the harm to decedent was inflicted by third parties acting negligently. Defendant invokes the maxim that an actor is entitled to assume that others will not act negligently. This concept is valid, however, only to the extent the intervening conduct was not to be anticipated. If the likelihood that a third person may react in a particular manner is a hazard which makes the actor negligent, such reaction whether innocent or negligent does not prevent the actor from being liable for the harm caused thereby. (*Richardson* v. *Ham* (1955) 44 Cal.2d 772, 777 [285 P.2d 269].) Here, reckless conduct by youthful contestants, stimulated by defendant's broadcast, constituted the hazard to which decedent was exposed.

It is true, of course, that virtually every act involves some conceivable danger. Liability is imposed only if the risk of harm resulting from the act is deemed unreasonable — i.e., if the gravity and likelihood of the danger outweigh the utility of the conduct involved.

We need not belabor the grave danger inherent in the contest broadcast by defendant. The risk of a high speed automobile chase is the risk of death or serious injury. Obviously, neither the entertainment afforded by the contest nor its commercial rewards can justify the creation of such a grave risk. Defendant could have accomplished its objectives of entertaining its listeners and increasing advertising revenues by adopting a contest format which would have avoided danger to the motoring public.

Defendant's contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit. The issue here is civil accountability for the foreseeable

results of a broadcast which created an undue risk of harm to decedent. The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.

We are not persuaded that the imposition of a duty here will lead to unwarranted extensions of liability. Defendant is fearful that entrepreneurs will henceforth be burdened with an avalanche of obligations: an athletic department will owe a duty to an ardent sports fan injured while hastening to purchase one of a limited number of tickets; a department store will be liable for injuries incurred in response to a "while-they-last" sale. This argument, however, suffers from a myopic view of the facts presented here. The giveaway contest was no commonplace invitation to an attraction available on a limited basis. It was a competitive scramble in which the thrill of the chase to be the one and only victor was intensified by the live broadcasts which accompanied the pursuit. In the assertedly analogous situations described by defendant, any haste involved in the purchase of the commodity is an incidental and unavoidable result of the scarcity of the commodity itself. In such situations there is no attempt, as here, to generate a competitive pursuit on public streets, accelerated by repeated importuning by radio to be the very first to arrive at a particular destination. Manifestly the "spectacular" bears little resemblance to daily commercial activities.

The judgment and the orders appealed from are affirmed. Plaintiffs shall recover their costs on appeal. The parties shall bear their own costs on the cross-appeal.

Wright, C.J., McComb, J., Tobriner, J., Sullivan, J., Clark, J., and Richardson, J., concurred.

HUSTLER MAG. v. FALWELL

485 U.S. 46 (1988)

CHIEF JUSTICE WILLIAM REHNQUIST delivered the opinion of the Court. . . .

The inside front cover of the November 1983 issue of Hustler Magazine featured a "parody" of an advertisement for Campari Liqueur that contained the name and picture of respondent and was entitled "Jerry Falwell talks about his first time." This parody was modeled after actual Campari ads that included interviews with various celebrities about their "first times." Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of "first times." Copying the form and layout of these Campari ads, Hustler's editors chose respondent as the featured celebrity and drafted an alleged "interview" with him in which he states that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. The Hustler parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, "ad parody—not to be taken seriously." The magazine's table of contents also lists the ad as "Fiction; Ad and Personality Parody."

[Falwell sued. The trial court directed a verdict for defendants on the privacy claim. The jury found against Falwell on the libel claim because it concluded "that the ad parody could not reasonably be understood as describing actual facts about Falwell or actual events in which he participated." However, the jury found for Falwell on the intentional infliction of emotional distress claim, and awarded $100,000 in compensatory damages, as well as $50,000 in punitive damages against each defendant. The Court of Appeals affirmed.]

Respondent would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently

offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.

[The Court here discussed many of the libel cases and the First Amendment standards and policies. It then described the plaintiff's separate claim for Intentional Infliction of Emotional Distress.]

In respondent's view, and in the view of the Court of Appeals, so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it is of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false. It is the intent to cause injury that is the gravamen of the tort, and the State's interest in preventing emotional harm simply outweighs whatever interest a speaker may have in speech of this type.

Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently "outrageous." But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), we held that even when a speaker or writer is motivated by hatred or ill will his expression was protected by the First Amendment. . . .

Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject. [The Court reviewed the history of satiric political cartoons and their role in public debate.]

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. . . .

Respondent contends, however, that the caricature in question here was so "outrageous" as to distinguish it from more traditional political cartoons. There is no doubt that the caricature of respondent and his mother published in Hustler is at best a distant cousin of the political cartoons described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. . . . [T]he sort of expression involved in this case does not seem to us to be governed by any exception to the general First Amendment principles stated above.

We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a "blind application" of the *New York Times* standard, it reflects our considered judgment that such a standard is

necessary to give adequate "breathing space" to the freedoms protected by the First Amendment.

Here it is clear that respondent Falwell is a "public figure" for purposes of First Amendment law. . . . The Court of Appeals interpreted the jury's finding to be that the ad parody "was not reasonably believable," and in accordance with our custom we accept this finding. Respondent is thus relegated to his claim for damages awarded by the jury for the intentional infliction of emotional distress by "outrageous" conduct. But for reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here. The judgment of the Court of Appeals is accordingly

Reversed.

JUSTICE ANTHONY KENNEDY took no part in the consideration or decision of this case.

JUSTICE BYRON WHITE, concurring in the judgment.

As I see it, the decision in *New York Times Co. v. Sullivan* has little to do with this case, for here the jury found that the ad contained no assertion of fact. But I agree with the Court that the judgment below, which penalized the publication of the parody, cannot be squared with the First Amendment.

Week 2

Brown v. Entertainment Merchants Association
564 U.S. 786 (2011)

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether a California law imposing restrictions on violent video games comports with the First Amendment .

I

California Assembly Bill 1179 (2005), Cal. Civ. Code Ann. §§1746–1746.5 (West 2009) (Act), prohibits the sale or rental of "violent video games" to minors, and requires their packaging to be labeled "18." The Act covers games "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." §1746(d)(1)(A). Violation of the Act is punishable by a civil fine of up to $1,000. §1746.3.

Respondents, representing the video-game and software industries, brought a preenforcement challenge to the Act in the United States District Court for the Northern District of California. That court concluded that the Act violated the First Amendment and permanently enjoined its enforcement. The Court of Appeals affirmed, and we granted certiorari.

California correctly acknowledges that video games qualify for First Amendment protection. The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that

it is difficult to distinguish politics from entertainment, and dangerous to try. "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." *Winters* v. *New York* , 333 U. S. 507, 510 (1948) . Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.

The most basic of those principles is this: "[A]s a general matter, … government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft* v. *American Civil Liberties Union* , 535 U. S. 564, 573 (2002). There are of course exceptions. From 1791 to the present, the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas[.] These limited areas—such as obscenity, *Roth* v. *United States* , 354 U. S. 476, 483 (1957) , incitement, *Brandenburg* v. *Ohio* , 395 U. S. 444, 447–449 (1969) *(per curiam)* , and fighting words, *Chaplinsky* v. *New Hampshire* , 315 U. S. 568 , 572 (1942)—represent "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *id.* , at 571–572.

Last Term, in *Stevens* , we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated. *Stevens* concerned a federal statute purporting to criminalize the creation, sale, or possession of certain depictions of animal cruelty. See 18 U. S. C. §48 (amended 2010). The statute covered depictions "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" if that harm to the animal was illegal where the "the creation, sale, or possession t[ook] place," §48(c)(1). There was no American tradition of forbidding the *depiction of* animal cruelty—though States have long had laws against *committing* it.

The Government argued in *Stevens* that lack of a historical warrant did not matter; that it could create new categories of unprotected speech by applying a "simple balancing test" that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test. We emphatically rejected that "startling and dangerous" proposition. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the "judgment [of] the American people," embodied in the First Amendment , "that the benefits of its restrictions on the Government outweigh the costs."

That holding controls this case.

The California Act … wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children.

That is unprecedented and mistaken. "[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik* v. *Jacksonville* , 422 U. S. 205, 212–213 (1975) (citation omitted). No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed.

California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none. Certainly the *books* we give children to read—or read to them when they are younger—contain no shortage of gore. Grimm's Fairy

Tales, for example, are grim indeed. As her just deserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers "till she fell dead on the floor, a sad example of envy and jealousy." The Complete Brothers Grimm Fairy Tales 198 (2006 ed.). Cinderella's evil stepsisters have their eyes pecked out by doves. *Id.* , at 95. And Hansel and Gretel (children!) kill their captor by baking her in an oven. *Id.* , at 54.

High-school reading lists are full of similar fare. Homer's Odysseus blinds Polyphemus the Cyclops by grinding out his eye with a heated stake. The Odyssey of Homer, Book IX, p. 125 (S. Butcher & A. Lang transls. 1909) ("Even so did we seize the fiery-pointed brand and whirled it round in his eye, and the blood flowed about the heated bar. And the breath of the flame singed his eyelids and brows all about, as the ball of the eye burnt away, and the roots thereof crackled in the flame"). In the Inferno, Dante and Virgil watch corrupt politicians struggle to stay submerged beneath a lake of boiling pitch, lest they be skewered by devils above the surface. Canto XXI, pp. 187–189 (A. Mandelbaum transl. Bantam Classic ed. 1982). And Golding's Lord of the Flies recounts how a schoolboy called Piggy is savagely murdered *by other children* while marooned on an island. W. Golding, Lord of the Flies 208–209 (1997 ed.). [4]

This is not to say that minors' consumption of violent entertainment has never encountered resistance. In the 1800's, dime novels depicting crime and "penny dreadfuls" (named for their price and content) were blamed in some quarters for juvenile delinquency. When motion pictures came along, they became the villains instead. "The days when the police looked upon dime novels as the most dangerous of textbooks in the school for crime are drawing to a close… . They say that the moving picture machine … tends even more than did the dime novel to turn the thoughts of the easily influenced to paths which sometimes lead to prison." Moving Pictures as Helps to Crime, N. Y. Times, Feb. 21, 1909. For a time, our Court did permit broad censorship of movies because of their capacity to be "used for evil," see *Mutual Film Corp.* v. *Industrial Comm'n of Ohio* , 236 U. S. 230, 242 (1915) , but we eventually reversed course, *Joseph Burstyn, Inc.* , 343 U. S., at 502. Radio dramas were next, and then came comic books. Many in the late 1940's and early 1950's blamed comic books for fostering a "preoccupation with violence and horror" among the young, leading to a rising juvenile crime rate. But efforts to convince Congress to restrict comic books failed. And, of course, after comic books came television and music lyrics.

California claims that video games present special problems because they are "interactive," in that the player participates in the violent action on screen and determines its outcome. The latter feature is nothing new: Since at least the publication of The Adventures of You: Sugarcane Island in 1969, young readers of choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to. Cf. *Interactive Digital Software Assn.* v. *St. Louis County,* 329 F. 3d 954, 957–958 (CA8 2003). As for the argument that video games enable participation in the violent action, that seems to us more a matter of degree than of kind. As Judge Posner has observed, all literature is interactive. "[T]he better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own." *American Amusement Machine Assn.* v. *Kendrick* , 244 F. 3d 572, 577 (CA7 2001) (striking down a similar restriction on violent video games).

Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. The State must specifically identify an "actual problem" in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard.

California cannot meet that standard. At the outset, it acknowledges that it cannot show a direct causal link between violent video games and harm to minors. Rather, relying upon our decision in *Turner Broadcasting System, Inc.* v. *FCC* , 512 U. S. 622 (1994) , the State claims that it need not produce such proof because the legislature can make a predictive judgment that such a link exists, based on competing psychological studies. But reliance on *Turner Broadcasting* is misplaced. That decision applied *intermediate scrutiny* to a content-neutral regulation. California's burden is much higher, and because it bears the risk of uncertainty, ambiguous proof will not suffice.

The State's evidence is not compelling. California relies primarily on the research of Dr. Craig Anderson and a few other research psychologists whose studies purport to show a connection between exposure to violent video games and harmful effects on children. These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games *cause* minors to *act* aggressively (which would at least be a beginning). Instead, nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology. They show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children's feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game.

Even taking for granted Dr. Anderson's conclusions that violent video games produce some effect on children's feelings of aggression, those effects are both small and indistinguishable from effects produced by other media. In his testimony in a similar lawsuit, Dr. Anderson admitted that the "effect sizes" of children's exposure to violent video games are "about the same" as that produced by their exposure to violence on television. And he admits that the *same* effects have been found when children watch cartoons starring Bugs Bunny or the Road Runner, or when they play video games like Sonic the Hedgehog that are rated "E" (appropriate for all ages), or even when they "vie[w] a picture of a gun".

Of course, California has (wisely) declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns. The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.

The Act is also seriously underinclusive in another respect—and a respect that renders irrelevant the contentions of the concurrence and the dissents that video games are qualitatively different from other portrayals of violence. The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it's OK.

California cannot show that the Act's restrictions meet a substantial need of parents who wish to restrict their children's access to violent video games but cannot do so. [The Court described the video game industry's self-regulation through video game ratings.]

And finally, the Act's purported aid to parental authority is vastly overinclusive. Not all of the children who are forbidden to purchase violent video games on their own have parents who *care* whether they purchase violent video games. While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want. This is not the narrow tailoring to "assisting parents" that restriction of First Amendment rights requires.

Week 3

Pernell v. Florida Board of Governors of the State University System (11th Cir. 2022)

"It was a bright cold day in April, and the clocks were striking thirteen," and the powers in charge of Florida's public university system have declared the State has unfettered authority to muzzle its professors in the name of "freedom." To confront certain viewpoints that offend the powers that be, the State of Florida passed the so-called "Stop W.O.K.E." Act2 in 2022—redubbed (in line with the State's doublespeak) the "Individual Freedom Act." The law officially bans professors from expressing disfavored viewpoints in university classrooms while permitting unfettered expression of the opposite viewpoints. Defendants argue that, under this Act, professors enjoy "academic freedom" so long as they express only those viewpoints of which the State approves.3 This is positively dystopian.4 It should go without saying that "[i]f liberty means anything at all it means the right to tell people what they do not want to hear."5

In 2022, the Florida Legislature passed the "Individual Freedom Act" (IFA). The IFA amended the Florida Educational Equity Act (FEEA) to prohibit "training or instruction that espouses, promotes, advances, inculcates, or compels . . . student[s] or employee[s] to believe [eight specified concepts]." § 1000.05(4)(a), Florida Statutes (2022). These eight concepts are as follows:

1. Members of one race, color, sex, or national origin are morally superior to members of another race, color, sex, or national origin.
2. An individual, by virtue of his or her race, color, sex, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
3. An individual's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, sex, or national origin.
4. Members of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin.
5. An individual, by virtue of his or her race, color, sex, or national origin, bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, sex, or national origin.
6. An individual, by virtue of his or her race, color, sex, or national origin, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion.
7. An individual, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the individual played no part, committed in the past by other members of the same race, color, sex, or national origin.
8. Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a particular race, color, sex, or national origin to oppress members of another race, color, sex, or national origin.

§ 1000.05(4)(a)1.–8., Fla. Stat. (2022).

The IFA also included a so-called "savings clause,"6 which states that the foregoing "may not be construed to prohibit discussion of the concepts listed therein as part of a larger course of training or instruction, provided such training or instruction is given in an objective manner without endorsement of the concepts." § 1000.05(4)(b), Fla. Stat. (2022). Thus, professors may "discuss" the eight concepts listed above in class, but they must do so "in an objective manner" and "without endorsement of the concepts." Id.

The FEEA applies to public colleges and universities in Florida. See § 1000.05(2)(a), Fla. Stat. (2022). Any "person aggrieved by a violation" of the FEEA "has a right of action for such equitable relief as the court may determine." § 1000.05(9), Fla. Stat. (2022).

Plaintiffs include university professors and college students who challenge the IFA's amendments to the FEEA and the Board of Governors's implementing regulation as they relate to prohibiting expression of certain viewpoints regarding the eight specified concepts during class instruction. Plaintiffs assert these provisions are unconstitutional under the First and Fourteenth Amendments. They ask this Court to enjoin enforcement of the challenged provisions, citing the Supreme Court's long history of shielding academic freedom from government encroachment and the First Amendment's intolerance toward government attempts to "cast a pall of orthodoxy over the classroom." See Keyishian v. Bd. of Regs. of Univ. of State of N.Y., 385 U.S. 589, 683 (1967).

Defendants respond that the First Amendment offers no protection here. They argue that because university professors are public employees, they are simply the State's mouthpieces in university classrooms. As a result, Defendants claim, the State has unfettered authority to limit what professors may say in class, even at the university level. Alternatively, Defendants suggest that even if this Court is required to balance the State's interests against the professors' First Amendment rights, the State's interests always trump the professors' rights. According to Defendants, so long as professors work for the State, they must all read from the same music.7

This Court pauses to offer an example of what this challenged law means if you accept Defendants' position. At oral argument, Defendants conceded that concept six—as mentioned above, that "[a] person, by virtue of his or her race, color, national origin, or sex should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion"—is another way to describe affirmative action. When asked directly whether concept six is "affirmative action by any other name," defense counsel answered, unequivocally, "Your Honor, yes." Tr. at 91. Thus, Defendants assert the idea of affirmative action is so "repugnant" that instructors can no longer express approval of affirmative action as an idea worthy of merit during class instruction. See id. at 42.

Over time, the Supreme Court has recognized two modes of restricting speech that are almost always subject to heightened scrutiny—namely, content-based restrictions and viewpoint-based restrictions. This Court notes the distinction at the outset as it has direct implications for the State's ability, within constitutional bounds, to restrict educators' speech in public university classrooms—but more on that later.

Start with content. "[T]he First Amendment, subject only to narrow and wellunderstood exceptions, does not countenance governmental control over the content of messages expressed by private individuals." Turner Broadcasting Sys., Inc. v. F.C.C., 512 U.S. 622, 641 (1994) (emphasis added). Thus, the Supreme Court has traditionally applied "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." Id. at 642. A government regulation of speech is content-based if, on its face, the law "draws distinctions based on the message a speaker conveys." Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015). In addition, laws that are "facially content neutral . . . will be considered content-based regulations of speech . . . [if they] cannot be justified without reference to the content of the regulated speech,' or [if they] were adopted by the government 'because of disagreement with the message the speech conveys.' " Id. at 164 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

Next, viewpoint. The Supreme Court has recognized viewpoint-based restrictions as a distinct subset of content discrimination. "Government discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.' " Reed, 576 U.S. at 168 (emphasis added) (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)); see also R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) ("In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination . . . . St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.") (emphasis added). With respect to viewpoint-based restrictions on protected speech, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." Rosenberger, 515 U.S. at 829.

With these principles in mind, this Court turns to the unique role public universities play under the First Amendment and whether the State may permissibly enforce viewpoint-based restrictions on educators' classroom speech.

"[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment." Healy v. James, 408 U.S. 169, 180 (1972). As recently as 2003, the Supreme Court reaffirmed "that given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (listing cases); see also Healy, 408 U.S. at 180–81 ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.").

To be clear, though, the Supreme Court has never definitively proclaimed that "academic freedom" is a stand-alone right protected by the First Amendment. Moreover, the Eleventh Circuit has explicitly rejected the argument that "academic freedom" is an independent constitutional right. See Bishop v. Aronov, 926 F.2d 1066, 1075 (11th Cir. 1991) ("Though we are mindful of the invaluable role academic freedom plays in our public schools, particularly at the post-secondary level, we do not find support to conclude that academic freedom is an independent First Amendment right.").12 But the Eleventh Circuit still recognized that academic freedom remains an important interest to consider when analyzing university professors' First Amendment claims. See id. ("Last and somewhat countervailing, we consider the strong predilection for academic freedom as an adjunct of the free speech rights of the First Amendment."). This is consistent with binding precedent, as the Supreme Court has long recognized that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). Accordingly, "the state may not act as though professors or students 'shed their constitutional rights to freedom of speech or expression at the [university] gate.' " Meriwether, 992 F.3d at 503 (alteration added) (quoting Tinker, 393 U.S. at 506). Nor does the First Amendment "tolerate laws that cast a pall of orthodoxy over the classroom." Keyishian, 385 U.S. at 683.

This Court also recognizes that while "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," Shelton v. Tucker, 364 U.S. 479, 487 (1960), these freedoms are not unlimited. Indeed, the Supreme Court has "repeatedly emphasized the need for

affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." Tinker, 393 U.S. at 507 (citations omitted).

With respect to regulating in-class speech consistent with constitutional safeguards, this Court again pauses to distinguish between the State's valid exercise in prescribing a university's curriculum and the State's asserted interest in prohibiting educators from expressing certain viewpoints about the content of that curriculum. The Supreme Court has long recognized that "[a] university's mission is education," and it "has never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981). "By and large, public education in our Nation is committed to the control of state and local authorities." Epperson v. Arkansas, 393 U.S. 97, 104 (1968). To that end, universities may generally make content-based decisions "as to how best to allocate scarce resources or 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' " Widmar, 454 U.S. at 278 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result)).

At the hearing on Plaintiffs' motions, both sides recognized this authority of the State to prescribe the content of its universities' curriculum. 13 Indeed, this makes intuitive sense. Of course the State has a say in which courses are taught at its public universities. Cf. Epperson, 393 U.S. at 116 (Stewart, J., concurring in result) ("A State is entirely free, for example, to decide that the only foreign language to be taught in its public school system shall be Spanish. But would a State be constitutionally free to punish a teacher for letting his students know what other languages are also spoken in the world? I think not."); id. at 111 (Black, J., concurring in result) ("It is plain that a state law prohibiting all teaching of human development or biology is constitutionally quite different from a law that compels a teacher to teach as true only one theory of a given doctrine. It would be difficult to make a First Amendment case out of a state law eliminating the subject of higher mathematics, or astronomy, or biology from its curriculum.").

But Defendants take it a step further, arguing that the State—though constitutionally barred from compelling professors to express the State's chosen belief—has an unfettered right to prohibit professors from expressing viewpoints with which it disagrees. Thus, according to Defendants, the content of university curriculum may include the State's preferred viewpoint on the subject matter of prescribed courses and certainly excludes (at the State's discretion) any viewpoint the State chooses to prohibit. Defendants ground this argument in the notion that anything professors utter in a state university classroom during "in-class instruction" is government speech, and thus, the government can both determine the content of that speech and prohibit the expression of certain viewpoints. See, e.g., ECF No. 52 at 19, in Case No.: 4:22cv324-MW/MAF ("The in-class instruction offered by stateemployed educators is also pure government speech, not the speech of the educators themselves.").

Defendants reach this conclusion by cherry-picking language, devoid of context, from two cases in particular—namely, Rosenberger and Garcetti. In Rosenberger, the Supreme Court held that the University of Virginia's denial of funding for a student group amounted to impermissible viewpoint discrimination because the denial was based not on the general religious subject matter of the student group's publication, but on the "prohibited perspective" concerning the "general subject matter." Rosenberger, 515 U.S. at 832. In so holding, the Supreme Court rejected the University's reliance on the Court's "assurance" in Widmar that universities have the right "to make academic judgments as to how

best to allocate scarce resources." Id. at 833. Highlighting the fact that Rosenberger involved student, not university, speech, the Supreme Court reaffirmed that the State may "speak[]" when it determines "the content of the education it provides." Id. The Court added that its "holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles." Id. at 834. Here, again, Defendants point to this language to conflate viewpoint with content. They stretch the Court's discussion concerning the "University's own speech" to suggest that the Court really meant that the State has complete authority to prohibit university employees from expressing any viewpoint with which it disagrees. But that is not the law.

Contrary to Defendants' argument, Rosenberger did not hold or even suggest that everything a professor utters in a university classroom is the university's speech. Instead, Rosenberger identifies that (1) content and viewpoint discrimination are discrete concerns under the First Amendment; (2) universities cannot discriminate against student speech based on viewpoint; and (3) university speech is a different animal, "controlled by different principles." Id. Rosenberger cites Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988), in support of the statement that prohibiting viewpoint restrictions on student speech does not restrict the University's speech ("which is controlled by different principles"). 515 U.S. at 834.
…

Turning back to Defendants' main argument—that the First Amendment does not protect professors' in-class speech—they connect the professors' speech to the university's speech via Garcetti v. Ceballos, 547 U.S. 410 (2006). In that case, the Supreme Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Garcetti, 547 U.S. at 421. Thus, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." Id. at 421–22. "It simply reflects the exercise of employer control over what the employer itself has commissioned or created." Id. at 422 (citing Rosenberger, 515 U.S. at 833 ("When the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.")).

But the Supreme Court expressly declined to "decide whether [its government speech] analysis . . . would apply in the same manner to a case involving speech related to scholarship or teaching." Garcetti, 547 U.S. at 425. In so doing, the Court recognized that "expression related to academic scholarship or classroom instruction [arguably] implicates additional constitutional interests that are not fully accounted for by [the] Court's customary employee-speech jurisprudence." Id.; see also id. at 438 (Souter, J., dissenting) ("I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.' " (quoting Grutter, 538 U.S. at 329)).

[The court described the plaintiffs bringing the constitutional challenge. I have excerpted just a couple to give you a sense…]

Plaintiff Sharon Austin has worked as a professor at the University of Florida since 2001. She currently serves as a Professor of Political Science. ECF No. 13-3 3, in Case No.: 4:22cv304-MW/MAF (Austin Declaration). Professor Austin teaches several courses rooted in her extensive background in American politics, including Politics of Race, Urban Politics, Black Horror and Social Justice, and African American

Politics and Policy. Id. ¶¶ 27–32. As part of these courses, Professor Austin endorses critical race theory and assigns reading materials that advocate for affirmative action. Id. ¶¶ 40–43. To avoid discipline under the IFA, Professor Austin plans to self-censor. Id. 44.

Plaintiff Shelley Park is a tenured Professor of Philosophy and Cultural Studies at the University of Central Florida. ECF No. 13-4 3, in Case No.: 4:22cv304-MW/MAF (Park Declaration). Professor Park has taught in higher education for over thirty-five years. Id. Currently, she teaches four undergraduate courses: (1) Feminist Theories; (2) Theories of Sex and Gender in the Humanities; (3) Race and Technology; and (4) Introduction to Philosophy. Id. In some of her courses, Professor Park teaches that merit, objectivity, and colorblindness function to solidify systems of oppression as foundational truths rather than academic theories. Id. 3. Fearing disciplinary action for violating the IFA, Professor Park feels the need to self-censor. Id. 34

Plaintiff Russell Almond has worked as an associate professor of Measurement and Statistics in the Department of Educational Psychology and Learning Systems at Florida State University since 2010. ECF No. 13-6 3, in Case No.: 4:22cv304-MW/MAF (Russell Declaration). Catering to students pursuing doctorates and master's degrees, Professor Almond currently teaches Basic Descriptive and Inferential Statistics Applications, Missing Data Analysis, Bayesian Data Analysis, and Educational Psychology Colloquium. Id. 9. Professor Almond encourages students to consider systemic discrimination when evaluating the effects of race in statistical models, in addition to discussing his own white privilege in a class handout. Id. 20. Professor Almond asserts that his speech will be chilled as a result of the IFA. Id. 32.

Starting with Professor Pernell, he asserts that he typically assigns a casebook that he authored as part of his course on the Role of Race in Criminal Procedure at FAMU Law. ECF No. 13-1 22, in Case No: 4:22cv304-MW/MAF (Pernell Declaration). He will likely teach this class in the 2023 spring semester, id. 16, and most of the readings for it come from his casebook (which includes excerpts of his scholarship), id. 22. Professor Pernell's casebook explains how racism became embedded in the criminal legal system and that it remains embedded there. Id. Professor Pernell realizes the risk to him personally if he were to violate the IFA, id. 28, and that the IFA arguably requires him to stop using his casebook in class, id. 22. This is because the notion that the criminal legal system is not colorblind—and, in turn, that some people are disadvantaged due to their race— arguably promotes or compels belief in the IFA's third and fourth concepts. See §§ 1000.05(4)(a)3.–4., Fla. Stat. (2022); Regulation 10.005(1)(a)3.–4.

[And now the analysis…]

In *Bishop*, the Eleventh Circuit determined that— under the facts of that case—[] the University of Alabama deemed [Dr. Bishop's] religious discussions to be outside the scope of his course's curriculum[.] Dr. Bishop had a weak interest in academic freedom to support his contention that he should be free to discuss his religious beliefs while teaching his exercise physiology course and holding "after-class" meetings in connection with that course. Id. at 1076 ("In short, Dr. Bishop and the University disagree about a matter of content in the course he teaches. The University must have the final say in such a dispute."). Certainly, "academic freedom" does not justify a professor hijacking their class discussion to focus on matters outside the established curriculum.

But here, in these cases now before this Court, Plaintiffs' free speech claims present an interest in academic freedom of the highest degree. Professor Plaintiffs are not attempting to alter the permitted curriculum. Instead, they seek to prevent the State of Florida from imposing its orthodoxy of viewpoint about that curriculum in university classrooms across the state. According to the State of Florida, so long as professors avoid promotion of one side of a particular idea—or do the State of Florida's bidding and condemn those ideas that the State has deemed unworthy— professors need fear no consequences from the State.58 But to step out of line during class and utter a single expression of approval of one of the State of Florida's disfavored ideas is to risk discipline or even termination. In other words, the State of Florida says that to avoid indoctrination, the State of Florida can impose its own orthodoxy and can indoctrinate university students to its preferred viewpoint. This extravagant doublespeak flies in the face of "the invaluable role academic freedom plays in our public schools, particularly at the post-secondary level . . . ." Bishop 926 F.2d at 1075. As the Supreme Court has previously announced, "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." Keyishian, 385 U.S. at 603 (quoting Sweezy, 354 U.S. at 250).

The IFA is antithetical to academic freedom and has cast a leaden pall of orthodoxy over Florida's state universities. Neither the State of Florida's authority to regulate public school curriculum, nor its interest in preventing race or sex discrimination can support its weight. Nor does the First Amendment tolerate it. In this case, unlike in Bishop, the interest in academic freedom weighs heavily in Plaintiffs' favor.

Striking at the heart of "open-mindedness and critical inquiry," the State of Florida has taken over the "marketplace of ideas" to suppress disfavored viewpoints and limit where professors may shine their light on eight specific ideas. And Defendants' argument permits zero restraint on the State of Florida's power to expand its limitation on viewpoints to any idea it chooses.

One thing is crystal clear—both robust intellectual inquiry and democracy require light to thrive. Our professors are critical to a healthy democracy,70 and the State of Florida's decision to choose which viewpoints are worthy of illumination and which must remain in the shadows has implications for us all. If our "priests of democracy" are not allowed to shed light on challenging ideas, then democracy will die in darkness. 71 But the First Amendment does not permit the State of Florida to muzzle its university professors, impose its own orthodoxy of viewpoints, and cast us all into the dark.

Accordingly, The Pernell Plaintiffs' motion for a preliminary injunction, ECF No. 12, in Case No.: 4:22cv304-MW/MAF, is GRANTED in part.

Week 5

Sandmann v. WP Co.
401 F. Supp. 3d 781 (E.D. Ky. 2019)

OPINION AND ORDER

WILLIAM O. BERTELSMAN, District Judge

This is a defamation action arising out of events that occurred in our nation's capital on January 19, 2019, among various groups who were exercising their rights to free assembly and speech. In this age of social media, the events quickly became the subject of posts, squares, tweets, online videos, and – pertinent here – statements published by major media outlets.

As a result, plaintiff Nicholas Sandmann ("Sandmann") found himself thrust into the national spotlight. He has filed suit against defendant WP Company LLC d/b/a The Washington Post ("The Post"), alleging that The Post negligently published false statements about him that were defamatory in relation to the events in question.

Factual and Procedural Background

On January 18, 2019, a group of students from Covington Catholic High School in Park Hills, Kentucky attended the March for Life in Washington, D.C., accompanied by sixteen adults. (Compl. 20). Among the students was plaintiff Nicholas Sandmann, who was wearing a "Make America Great Again" ("MAGA") hat that he had bought as a souvenir.

Sandmann and his classmates were instructed to wait at the steps of the Lincoln Memorial for the buses to arrive for their return trip to Kentucky. While the students waited, a group of men from an organization called the Black Hebrew Israelites began yelling racial epithets and threats of violence towards them.

When this yelling had been going on for almost an hour, a third group of individuals – Native Americans who had been attending the Indigenous Peoples March on the National Mall that day – began approaching the students, singing and dancing, and recording a video. At the front of the group was a Native-American activist named Nathan Phillips ("Phillips"). Phillips was beating a drum and singing.

When the Native Americans reached the students, Sandmann was at the front of the student group. Phillips walked very close to Sandmann, beating his drum and singing within inches of Sandmann's face. Sandmann did not confront Phillips or move toward him, and Phillips made no attempt to go past or around Sandmann. Sandmann remained silent and looked at Phillips as he played his drum and sang. The encounter ended when Sandmann and the other students were told to board their buses.

That evening, Kaya Taitano, a participant in the Indigenous People's March, posted online two short videos showing portions of the interaction between Sandmann and Phillips.

At 11:13 p.m., a Twitter account tweeted a short excerpt from Taitano's videos with the comment "This MAGA loser gleefully bothering a Native American protestor at the Indigenous Peoples March."

On Saturday, January 19, 2019, one of the Hebrew Israelite members who had been at the demonstration posted on Facebook a 1-hour, 46-minute video of the incident with Sandmann and Phillips, which Sandmann alleges accurately depicts those events.

That same day, the Post published the first of seven articles that Sandmann alleges were defamatory in various respects: one article on January 19; four on January 20; and two on January 21. The Post also

published three Tweets on its Twitter page on January 19 which Sandmann alleges were likewise defamatory.

The Court must now determine whether Sandmann's allegations state a viable claim for relief. These are purely questions of law that bear no relation to the degree of public interest in the underlying events or the political motivations that some have attributed to them.

Analysis

Kentucky Defamation Law

In Kentucky, a cognizable claim for defamation requires:

(a) a false and defamatory statement concerning another;

(b) an unprivileged publication to a third party;

(c) fault amounting at least to negligence on the part of the publisher; and

(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

The Court notes that the present motion does not require the Court to address the elements of truth/falsity, publication (which is not disputed), or negligence. At issue are only whether the statements are about Sandmann, whether they are fact or opinion, and whether they are defamatory.

Before turning to the merits, the Court must first discuss these important legal principles in more detail.

1. "About" or "Of and Concerning" the Plaintiff

The first element of a defamation claim requires that the challenged statements be "about" or "concerning" the plaintiff.

Generally, "the plaintiff need not be specifically identified in the defamatory matter itself so long as it was so *reasonably understood* by plaintiffs 'friends and acquaintances ... familiar with the incident.' " *Stringer* , 151 S.W.3d at 794 (alteration in original) (emphasis added) (quoting *E. W. Scripps Co. v. Cholmondelay* , 569 S.W.2d 700, 702 (Ky. Ct. App. 1978)). But this rule is limited by the principle, now memorialized in the Restatement, that "where defamatory statements are made against an aggregate body of persons, an individual member not specially imputed or designated cannot maintain an action." *See, e.g.* , *Louisville Times v. Stivers* , 252 Ky. 843, 68 S.W.2d 411, 412 (1934) (citation omitted).

Rest. 2d § 564A cmt. a ("no action lies for the publication of defamatory words concerning a large group or class of persons" and "no individual member of the group can recover for such broad and general defamation."); *id.* at cmt. c ("the assertion that one man out of a group of 25 has stolen an automobile may not sufficiently defame any member of the group, while the statement that all but one of a group of 25 are thieves may cast a reflection upon each of them").

For an individual plaintiff to bring a defamation action based on such comments, the Kentucky Supreme Court has instructed that "the statement must be applicable to every member of the class, and if the words used contain no reflection upon any particular individual, no averment can make them defamatory." *Kentucky Fried Chicken, Inc. v. Sanders* , 563 S.W.2d 8, 9 (Ky. 1978). This determination should be made "in the context of the whole article." *Id.*

2. The "Falsity" Requirement is Met Only Where the Words Used State Verifiable Facts, Not Opinions

The first element of a defamation claim also requires that the allegedly libelous statement be objectively false. Under Kentucky law, a statement in the form of an opinion can be defamatory, but it is "actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *Yancey v. Hamilton* , 786 S.W.2d 854, 857 (Ky. 1989) (quoting REST. 2d § 566). In *Milkovich v. Lorain Journal Co.* , however, the Supreme Court subsequently held that " 'a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection' and that 'statements that cannot reasonably [be] interpreted as stating actual facts, are not actionable.' " *Jolliff v. N.L.R.B.* , 513 F.3d 600, 610 (6th Cir. 2008) (internal quotation marks omitted) (quoting *Milkovich v. Lorain Journal Co.* , 497 U.S. 1, 20, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990)).

Here, The Post's articles concern groups of citizens who were assembled in the nation's capital to support or oppose various causes of importance to them. This is inherently a matter of public concern.

Kentucky has rejected the doctrine of "neutral reportage"; that is, a newspaper may still be held liable for quoting "newsworthy statements" of third parties.

3. The Publication, Evaluated as a Whole, Must be Defamatory, Not Merely False

Lastly, to satisfy the first element of a defamation claim, the language in question must "be both false *and defamatory.* A statement that is false, but not defamatory is not actionable; a statement that is true is not actionable even if defamatory." *Dermody v. Presbyterian Church U.S.A.* , 530 S.W.3d 467, 472-73 (Ky. Ct. App. 2017) (emphasis added). Sandmann alleges that the challenged statements "are defamatory *per se* , as they are libelous on their face without resort to additional facts."

The Restatement explains that what constitutes actionable defamation is not subject to the whims of those in society who are faint of heart:

Although defamation is not a question of majority opinion, neither is it a question of the existence of some individual or individuals with views sufficiently peculiar to regard as derogatory what the vast majority of persons regard as innocent. The fact that a communication tends to prejudice another in the eyes of even a substantial group is not enough if the group is one whose standards are so anti-social that it is not proper for the courts to recognize them.

Finally, the Court must "analyze the article in its entirety and determine if its gist or sting is defamatory."

C. The Post Articles

1. Article One

The First Article does not mention Sandmann by name, there is no identifiable description of him, and there is no picture of Sandmann in the article.

Instead, statement numbers 1-3, 8, 13, 15, and 16 refer to "hat wearing teens"; "the teens"; "teens and other apparent participants"; "A few people"; "those who should listen most closely"; and "They." These statements are not actionable because they are not about Sandmann.

Like the statements about groups or classes such as "the Stivers clan"; Kentucky Fried Chicken restaurants; and "teachers," statements such as "hat wearing teens," are clearly "made against an aggregate body of persons," and thus "an individual member not specially imputed or designated cannot maintain an action." *Id.* Sandmann is not specifically mentioned in the article. Therefore, because "the words used contain no reflection upon any particular individual, no averment can make them defamatory."

These statements are also not actionable for other reasons, discussed below.

Opinion versus Fact

Few principles of law are as well-established as the rule that statements of opinion are not actionable in libel actions.

This Court has had occasion to address this issue several times. *See Loftus v. Nazari* , 21 F. Supp.3d 849, 853-54 (E.D. Ky. 2014) (holding that patient's statements regarding allegedly poor results of plastic surgery were protected opinion); *Lassiter v. Lassiter* , 456 F. Supp. 2d 876, 881-82 (E.D. Ky. 2006) (holding that woman's statement that her ex-husband had committed adultery was protected opinion because the facts on which she based that statement were all disclosed in the publication in question), *aff'd* , 280 F. App'x 503 (6th Cir. 2008).

Pure opinion ... occurs where the commentator states the facts on which the opinion is based, or where both parties to the communication know or assume the exclusive facts on which the comment is based.

Under these authorities, the statements that Sandmann challenges constitute protected opinions that may not form the basis for a defamation claim.

First, statements 1-3, 10, 13, 16, 17 are not actionable because they do not state or imply "actual, objectively verifiable facts." Instead, these statements contain terms such as "ugly," "swarmed," "taunting," "disrespect," "ignored," "aggressive," "physicality," and "rambunctious." These are all examples of "loose, figurative," "rhetorical hyperbole" that is protected by the First Amendment because it Is not "susceptible of being proved true or false." *Milkovich* , 497 U.S. at 17, 21, 110 S.Ct. 2695 ; *Seaton v. TripAdvisor LLC* , 728 F.3d 592, 597 (6th Cir. 2013).

The above terms are also "inherently subjective," like "dirtiest," *Seaton* , 728 F.3d at 598, or "squandered" and "broke," *Welch* , 3 S.W.3d at 730, all of which are "not so definite or precise as to be branded as false." *Id.* ; *see also Turner v. Wells* , 879 F.3d 1254, 1270 (11th Cir. 2018).

Next, statement 2 quotes Phillips as saying he "felt threatened" when he was "swarmed." And statement 10 quotes this assertion:

> It was getting ugly, and I was thinking: "I've got to find myself an exit out of this situation and finish my song at the Lincoln Memorial," Phillips recalled. I started going that way, and **that guy in the hat stood in my way and we were at an impasse. He just blocked my way and wouldn't allow me to retreat.**
>
> (Doc. 1-5 at 3) (emphasis added).

Again, even if these statements could be construed to refer to Sandmann, they do not convey "actual, objectively verifiable facts." *Compuware* , 499 F.3d at 529 ; *Yancey* , 786 S.W.2d at 857. How Phillips "felt" is obviously subjective, and whether Phillips was "swarmed" or "blocked" is simply not "capable of being proved objectively incorrect." *Clark* , 617 F. App'x at 508 (citing *Milkovich* , 497 U.S. at 20, 110 S.Ct. 2695).

The word "block" is a transitive and "figurative" verb meaning "to obstruct or close with obstacles." "Swarm" simply means to "come together in a swarm or dense crowd." And one individual obviously cannot "swarm" another.

Sandmann admits he was standing in silence in front of Phillips in the center of a confusing confrontation between the students and the Indigenous Peoples group. Sandmann's intent, he avers, was to diffuse the situation by remaining motionless and calm. Phillips, however, interpreted Sandmann's action (or lack thereof) as blocking him and not allowing him to retreat. In statement 10, Phillips disclosed the reasons for his perception: the size of the crowd, the tense atmosphere, taunts directed at his group, and his memories of past discrimination. (Doc. 1-5). There were no undisclosed facts, and the reader was in as good a position as Phillips to judge whether the conclusion he reached – that he was "blocked" – was correct.

c. Defamatory Meaning

Even assuming, *arguendo* , that the above statements are "about" Sandmann and that they convey objectively provable facts, "there is no allegation of special damages, [so] unless the publication may be considered as actionable per se," the Court must dismiss the action.

Sandmann alleges that the "gist" of the First Article is that he (1) "assaulted" or "physically intimidated Phillips"; (2) "engaged in racist conduct"; and (3) "engaged in taunts." But this is not supported by the plain language in the article, which states none of those things.

Instead, Sandmann's reasoning is precisely the type of "explanation" and "innuendo" that "cannot enlarge or add to the sense or effect of the words charged to be libelous, or impute to them a meaning not warranted by the words themselves." And while unfortunate, it is further irrelevant that Sandmann was scorned on social media. That is "extrinsic evidence of context or circumstances" outside the four corners of the article.

First, the article cannot reasonably be read as charging Sandmann with physically intimidating Phillips or committing the criminal offense of assault. At best, Phillips is quoted in the article as saying that he "felt threatened" and "that guy in the hat ... blocked my way." As in *Roche* , where an individual stated he "feels harassed by [the plaintiff] and wants no contact," here, Phillips' statement that he "felt threatened" is merely "a third party's subjective feelings" and that "would not tend to expose

[Sandmann] to public hatred or to suggest his unfitness to work" and therefore "does not constitute libel per se."

Second, it is unreasonable to construe the article as meaning that Sandmann "engaged in racist conduct." The article, at most, quotes Phillips, who stated that an individual in a hat "blocked" his path and "we were at an impasse." It is irrelevant that others may have attributed a derogatory meaning to this statement. There is nothing defamatory about being party to a stubborn "impasse."

As the Restatement and Kentucky law make clear: if individuals, "by an unreasonable construction" attach a "derogatory meaning," this "does not render the language defamatory." REST. 2d § 563 cmt. c.

Finally, the article does not state that Sandmann "engaged in racist taunts." The article makes a vague reference to teens and other participants "taunting" the "indigenous crowd" and then merely states that "[a] few people ... began to chant build that wall," a political statement on an issue of public debate and often associated with party affiliation. This is not defamatory.

Articles Two and Three

Articles Two and Three merely repeat the statements contained in Article One, with the exception that they add statement 18 – a quote from the joint statement released by Covington Catholic High School and the Diocese of Covington – and Article Three adds statement 22, a headline.

Statement 18, as set forth in the attached chart, does not mention Sandmann but speaks only of "students," and as such it is not actionable. Further, the adjectives "jeering" and “disrespectful" are subjective opinions, and the balance of the statement conveys only that the speakers are investigating the matter and will take "appropriate action, up to and including expulsion." Sandmann alleges that the statement coveys that he "violated the fundamental standards of his religious community and violated the policies of his school such that he should be expelled." But the statement, in fact, conveys the opposite: the speakers had reached *no* conclusion about what occurred and were investigating the matter.

Finally, statement 22 is the headline on the Third Article: "Marcher's accost by boys in MAGA caps draws ire." (Doc. 1-7 at 2). This headline does not identify Sandmann but refers only to "boys," which is nonactionable for the reasons already discussed.

Further, the headline "Marcher's accost by boys in MAGA caps draws ire" is laden with rhetorical hyperbole. And the word "accost" has various meanings, including "To approach and speak to ... in a bold, hostile, or unwelcome manner; to waylay a person in this way; to address.... To draw near to or unto; to approach."

[The court considered several additional articles, but came to the same conclusions.]

Accordingly, Sandmann cannot maintain a claim based on any of the Post's publications, and the Court will dismiss the Complaint in its entirety.

IT IS ORDERED that The Post's motion to dismiss be, and is hereby, **GRANTED.**

Week 6

N.Y. Times Co. v. Sullivan

376 U.S. 254 (1964)

Mr. Justice William J. Brennan delivered the opinion of the Court.

[The plaintiff, Sullivan, an elected commissioner in charge of police, sued the New York Times Company and others for libel allegedly contained in a full-page advertisement published in the New York Times. He recovered $500,000 in the Alabama courts after the New York Times Company rejected his demand for retraction. The ad appealed for funds to support the civil rights movement and was signed by a number of well-known persons. It referred to "an unprecedented wave of terror" in the South. It went on as follows:]

"In Montgomery, Alabama, after students sang 'My Country, Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission." Sixth paragraph: "Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a felony under which they could imprison him for ten years. . . ."

Although neither of these statements mentions respondent by name, he contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of "ringing" the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission. As to the sixth paragraph, he contended that since arrests are ordinarily made by the police, the statement "They have arrested (Dr. King) seven times" would be read as referring to him; he further contended that the "They" who did the arresting would be equated with the "They" who committed the other described acts and with the "Southern violators." Thus, he argued, the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King's protests with "intimidation and violence," bombing his home, assaulting his person, and charging him with perjury. Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capitol steps, they sang the National Anthem and not "My Country, 'Tis of Thee." Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested

temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time "ring" the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

On the premise that the charges in the sixth paragraph could be read as referring to him, respondent was allowed to prove that he had not participated in the events described. Although Dr. King's home had in fact been bombed twice when his wife and child were there, both of these occasions antedated respondent's tenure as Commissioner, and the police were not only not implicated in the bombings, but had made every effort to apprehend those who were. . . .

Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel. . . .

[The jury was instructed under the common law rules allowing recovery without proof of actual damages. The trial judge refused to charge that actual malice or intent to harm was required. The Alabama Supreme Court affirmed.]

[Under Alabama law,] [o]nce "libel per se" has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. His privilege of "fair comment" for expressions of opinion depends on the truth of the facts upon which the comment is based. Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a punitive award by a retraction meeting the statutory requirements.

The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications. Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials. . . . [L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. [I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion."

The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."

Mr. Justice Brandeis, in his concurring opinion in Whitney v. California, gave the principle its classic formulation: "Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

. . . The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." . . . "[T]he people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." . . . "Whatever is added to the field of libel is taken from the field of free debate."

Injury to official reputation. . . affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. This is true even though the utterance contains "half-truths" and "misinformation." Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. . . . Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the First Amendment. That statute made it a crime, punishable by a $5,000 fine and five years in prison, "if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States."

Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. . . . Jefferson, as President, pardoned

those who had been convicted and sentenced under the Act and remitted their fines, stating: "I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." . . .

There is no force in respondent's argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States. [The Fourteenth Amendment applies the First Amendment's restrictions to the states by way of the due process clause.]

What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. . . .

The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge. . . .

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

. . .

[Alabama law provides that] where general damages are concerned malice is "presumed." Such a presumption is inconsistent with the federal rule. "The power to create presumptions is not a means of escape from constitutional restrictions." . . .

This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. . . . We must "make an independent examination of the whole record," so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression . . .

Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. [There was no evidence that individual signers of the ad or the New York Times were aware of erroneous statements at the time of publication.]

The Times' failure to retract upon respondent's demand . . . is likewise not adequate evidence of malice for constitutional purposes. Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here. First, the letter written by the Times reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to respondent at all. Second, it was not a final refusal, since it asked for an explanation on this point—a request that respondent chose to ignore. . . .

Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times "knew" the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. . . . We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.

We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent. . . .

[The Alabama Supreme Court found sufficient reference to the plaintiff because "the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body."]

This proposition has disquieting implications for criticism of governmental conduct. For good reason, "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." The present proposition would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. . . . Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression. We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other evidence to connect the statements with respondent, the evidence was constitutionally insufficient to support a finding that the statements referred to respondent. . . .

Reversed and remanded.

MR. JUSTICE HUGO BLACK, with whom MR. JUSTICE WILLIAM O. DOUGLAS joins (concurring).

. . . I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely "delimit" a State's power to award damages to "public officials against critics of their official conduct" but completely prohibit a State from exercising such a power. . . .

MR. JUSTICE ARTHUR GOLDBERG, with whom MR. JUSTICE WILLIAM O. DOUGLAS joins (concurring in the result).

. . . In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses. . .

Week 7

ZERAN V. AMERICA ONLINE, INC.

129 F.3d 327 (4th Cir. 1997)

J. HARVIE WILKINSON III, CHIEF JUDGE. . . .

On April 25, 1995, an unidentified person posted a message on an AOL bulletin board advertising "Naughty Oklahoma T-Shirts." The posting described the sale of shirts featuring offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Those interested in purchasing the shirts were instructed to call "Ken" at Zeran's home phone number in Seattle, Washington. As a result of this anonymously perpetrated prank, Zeran received a high volume of calls, comprised primarily of angry and derogatory messages, but also including death threats. Zeran could not change his phone number because he relied on its availability to the public in running his business out of his home. Later that day, Zeran called AOL and informed a company representative of his predicament. The employee assured Zeran that the posting would be removed from AOL's bulletin board but explained that as a matter of policy AOL would not post a retraction. The parties dispute the date that AOL removed this original posting from its bulletin board.

On April 26, the next day, an unknown person posted another message advertising additional shirts with new tasteless slogans related to the Oklahoma City bombing. Again, interested buyers were told to call Zeran's phone number, to ask for "Ken," and to "please call back if busy" due to high demand. The angry, threatening phone calls intensified. Over the next four days, an unidentified party continued to post messages on AOL's bulletin board, advertising additional items including bumper stickers and key chains with still more offensive slogans. During this time period, Zeran called AOL repeatedly and was told by company representatives that the individual account from which the messages were posted would soon be closed. Zeran also reported his case to Seattle FBI agents. By April 30, Zeran was receiving an abusive phone call approximately every two minutes.

Meanwhile, an announcer for Oklahoma City radio station KRXO received a copy of the first AOL posting. On May 1, the announcer related the message's contents on the air, attributed them to "Ken" at Zeran's phone number, and urged the listening audience to call the number. After this radio broadcast, Zeran was inundated with death threats and other violent calls from Oklahoma City residents. Over the next few days, Zeran talked to both KRXO and

AOL representatives. He also spoke to his local police, who subsequently surveilled his home to protect his safety. By May 14, after an Oklahoma City newspaper published a story exposing the shirt advertisements as a hoax and after KRXO made an on-air apology, the number of calls to Zeran's residence finally subsided to fifteen per day.

Zeran first filed suit on January 4, 1996, against radio station KRXO in the United States District Court for the Western District of Oklahoma. On April 23, 1996, he filed this separate suit against AOL in the same court. Zeran did not bring any action against the party who posted the offensive messages. AOL answered Zeran's complaint and interposed 47 U.S.C. § 230 as an affirmative defense. AOL then moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). The district court granted AOL's motion, and Zeran filed this appeal.

II.

A.

Because § 230 was successfully advanced by AOL in the district court as a defense to Zeran's claims, we shall briefly examine its operation here. Zeran seeks to hold AOL liable for defamatory speech initiated by a third party. He argued to the district court that once he notified AOL of the unidentified third party's hoax, AOL had a duty to remove the defamatory posting promptly, to notify its subscribers of the message's false nature, and to effectively screen future defamatory material. Section 230 entered this litigation as an affirmative defense pled by AOL. The company claimed that Congress immunized interactive computer service providers from claims based on information posted by a third party.

The relevant portion of § 230 states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).[12] By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.

The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. In specific statutory findings, Congress recognized the Internet and interactive computer services as offering "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." *Id.* § 230(a)(3). It also found that the Internet and interactive computer services "have flourished, to the benefit of all Americans, *with a minimum of government regulation.*" *Id.* § 230(a)(4) (emphasis added). Congress further stated that it is "the policy of the United States . . . to preserve the vibrant and competitive free market that

[12] Section 230 defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(e)(2). The term "information content provider" is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(e)(3). The parties do not dispute that AOL falls within the CDA's "interactive computer service" definition and that the unidentified third party who posted the offensive messages here fits the definition of an "information content provider."

presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*." *Id.* § 230(b)(2) (emphasis added).

None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. While Congress acted to keep government regulation of the Internet to a minimum, it also found it to be the policy of the United States "to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." *Id.* § 230(b)(5). Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.

Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. In this respect, § 230 responded to a New York state court decision, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.,* 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). There, the plaintiffs sued Prodigy—an interactive computer service like AOL—for defamatory comments made by an unidentified party on one of Prodigy's bulletin boards. The court held Prodigy to the strict liability standard normally applied to original publishers of defamatory statements, rejecting Prodigy's claims that it should be held only to the lower "knowledge" standard usually reserved for distributors. The court reasoned that Prodigy acted more like an original publisher than a distributor both because it advertised its practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin boards.

Congress enacted § 230 to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision. Under that court's holding, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a publisher. Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4). In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.

B.

Zeran next contends that interpreting § 230 to impose liability on service providers with knowledge of defamatory content on their services is consistent with the statutory purposes outlined in Part IIA. Zeran fails, however, to understand the practical implications of notice liability in the interactive computer service context. Liability upon notice would defeat the dual purposes advanced by § 230 of the CDA. Like the strict liability imposed by the *Stratton Oakmont* court, liability upon notice reinforces service providers' incentives to restrict speech and abstain from self-regulation.

If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context. Thus, like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech.

More generally, notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits. Whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply "notify" the relevant service provider, claiming the information to be legally defamatory. In light of the vast amount of speech communicated through interactive computer services, these notices could produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability. Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact.

For the foregoing reasons, we affirm the judgment of the district court.

Week 8

NOV 0 6 2025

TIKTOK v. EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA

IN THE SUPREME COURT OF THE STATE OF NEVADA

BEFORE THE SUPREME COURT, EN BANC.
OPINION

By the Court, CADISH, J.:

Real party in interest State of Nevada filed a complaint against petitioners TikTok, Inc., and its related entities asserting, as is relevant here, violations of the Nevada Deceptive Trade Practices Act (NDTPA). The State alleged that TikTok knowingly designed its social media and short-form online video platform to addict young users, thus inflicting various harms on young users in Nevada, and knowingly made misrepresentations and material omissions about the platform's safety. TikTok moved to dismiss, arguing lack of personal jurisdiction and immunity from liability. The district court denied the motion, determining that it could properly exercise specific personal jurisdiction over TikTok based on conduct purposefully directed at Nevada and that neither the Communications Decency Act (CDA), codified as 47 U.S.C. § 230, nor the First Amendment immunized TikTok from the State's NDTPA claims. TikTok now petitions for writ relief, challenging both rulings.

We agree with the district court as to both issues. First, the State showed that TikTok had the necessary litigation-related contacts to support specific jurisdiction via (1) TikTok's collection of young Nevada users' personal data and its sale of that data to third-party advertisers that target those users and (2) the design of its platform to maximize data collection and ad sales. Second, the CDA § 230 and the First Amendment do not bar the State's NDTPA claims as pleaded. One claim targets TikTok's own alleged misrepresentations and misleading omissions and therefore does not run afoul of the First Amendment or invoke TikTok's traditional editorial functions immunized under the CDA § 230. The other claim that TikTok uses harmful design features does not on its face target any expressive activity or third-party content; nor would TikTok need to alter or remove any third-party content to comply with the alleged duty to design a reasonably safe social media platform for young users. Accordingly, we deny TikTok's petition.

RELEVANT FACTS

Because this case is before us on a denied motion to dismiss, for purposes of our analysis, we view the following factual allegations from the State's complaint as true and draw all inferences in its favor. Buzz Stew, LLC u. City of North Las Vegas, 124 Nev. 224, 228, 181 P.3d 670. 672 (2008). TikTok is a free social rnedia platform that allows users to create, upload. and share their own short videos and watch, "like," share, and comment on other users' videos, known as TikToks. The TikTok platform is accessible online through an app on electronic devices, including cell phones. From users' online activity, TikTok collects personal data, including information about messages users send or receive, the content users provide, the way they interact with ads, the time they spend interacting with different

content, the hardware and software they use, and their locations. Although the app is free, TikTok generates revenue from the targeted, data-informed advertising opportunities that it sells to various companies. TikTok is popular with users aged 17 and under, with roughly 19 million U.S.-based young users on the platform as of 2022. TikTok generated roughly $9.4 billion in revenue in 2022, $2 billion of which resulted from ad revenue linked to young users in the U.S. TikTok has community guidelines that prohibit users from posting certain types of content, including sensitive and unlawful content. Those guidelines state that TikTok is "deeply committed to ensuring . . . a safe and positive experience for people under the age of 18."

The principal interface of the app is the "For You" feed, which presents an endless scroll of videos that TikTok recommends to users based on their activity on the app and TikTok's algorithm. A new video automatically appears and. begins playing when the user finishes watching a TikTok (autoplay). TikTok's algorithm uses signals from the user's interactions with various content and ads to personalize the scroll. To access the app, users must create an account and agree to TikTok's terms of service and privacy policy. TikTok's user interface also displays (either publicly or privately) a user's number of "friends" as well as the number of interactions, views, likes, dislikes, reactions, and comments on user-provided content (quantified popularity). Hashtag challenges are a popular trend on TikTok, wherein users take some action, record it, and post with a particular hashtag—e.g., the complaint refers to the "Blackout Challenge," where a user asphyxiates themself on camera, and the "Nutmeg Challenge," where the user attempts to ingest a large amount of nutmeg on camera, inducing hallucinations and other side effects.

TikTok sells digital coins to users that the users can send to their favorite TikTok content creators as gifts. TikTok also allows users to post live content that is only available in that moment (livestreaming). To drive engagernent, TikTok uses "push notifications" to alert users to new content that might interest the user or otherwise entice them back to the app with messages, buzzes, lights, or sounds. These notifications may arrive at any hour, day or night. TikTok also makes available augmented-reality or aural filters that users can apply to their own videos and photos, including cosmetic filters that alter a user's appearance to rnake them more attractive—e.g., the "Bold Glamour" filter, which changes facial features and simulates rnakeup.

TikTok recently added features that could be considered well-being initiatives. For example, the app prompts users who spend rnore than

100 minutes on the app to consider taking a break. TikTok users under the age of 15 on average spend roughly 105 minutes a day on TikTok, with 10 percent of those users spending more than 4 hours a day on the app. TikTok issued a publicly available statement on "Youth Safety and Well-Being," stating:

Youth safety is our priority. We do not allow content that may put young people at risk of exploitation, or psychological, physical, or developmental harm. This includes child sexual abuse material (CSAM), youth abuse, bullying, dangerous activities and challenges, exposure to overtly rnature themes, and consumption of alcohol, tobacco, drugs, or regulated substances. If we become aware of youth exploitation on our platform, we will ban the account, as well as any other accounts belonging to the person.

TikTok, Ltd.'s CEO stated in testimony to Congress that "[TikTok] will keep safety—particularly for teenagers—a top priorityll" TikTok has made similar comments at national and state PTA meetings. TikTok's Cornmunity Guidelines also state that TikTok "do[es] not allow showing or promoting disordered eating or any dangerous weight loss behaviors" or sexual activity or services" and does not allow the promotion of dangerous or criminal activities that may harm people, animals, or property. TikTok has also acknowledged problematic "filter bubbles," where a "user encounters only information and opinions that conform to and reinforce their own beliefs, caused by algorithms that personalize an individual's online experience." These filter bubbles result in content with drugs, alcohol, sex, and violence being placed in young users' For You feed because "the app doesn't differentiate between videos it serves adults and minors."

As of mid-2022, roughly 49 percent of all Nevadans were active TikTok users. Using users' personal data and location, TikTok allows advertisers inside and outside of Nevada to target Nevadans who are on the TikTok app. TikTok also engages in outdoor advertising, including billboards in Las Vegas and Reno. TikTok gave a grant to an elementary school PTA in Las Vegas and attended virtual PTA events, including an event that Nevada's PTA president attended. News stories have been published about kids in Nevada using TikTok in both productive and harmful ways. Lucy Diavolo, After Her Viral Tik Tok Calling for a Student Strike, Nevada Teen Gillian Sullivan Says Her Classmates Are Still Ready to Mobilize, Teen Vogue (Aug. 29, 2019), haps://www.teenvogue_com/story/

viral-tik-tok-student-strike-nevada-teen-gillian-sullivan; Jarah Wright, 'Man up, plead out'. Family of Andreas Probst calls OTT teens to plead guilty, KTNV (Oct. 18, 2023), https://www.ktnv.com/news/man-up-plead-out-fain ily-of-andreas-p robst-calls-on-tee ns-to-plead- guilty.

PROCEDURAL HISTORY

The State filed a complaint against TikTok, asserting claims for deceptive and unconscionable acts or practices in violation of the NDTPA and other torts. The State alleged that TikTok's platform uses harmful design features intended to keep young users on the app for as long as possible in order to maximize advertising revenue, including (1) low-friction variable rewards (endless scroll and auto-play), (2) social manipulation tools (quantified popularity and coins), (3) ephemeral content, (4) push notifications, (5) visual filters, and (6) ineffective and misleading parental controls and well-being initiatives. The State also alleged that, driven by commercial gain, TikTok publicly and knowingly made several misrepresentations and omissions to deceive consumers about young users' safety on the platform. To support this allegation, the State cited internal TikTok documents acknowledging that young users use the platform compulsively and access harmful content in their For You feed due to filter bubbles. The State further alleged that because of young users' unhealthy engagement with the TikTok app, they suffer mental, physical, and privacy harms.

TikTok moved to dismiss, arguing that (1) the district court lacks personal jurisdiction over it because the State's claims are not based on conduct that TikTok purposefully directed at Nevada, (2) the CDA § 230 immunizes TikTok from liability for third-party content published on the TikTok platform, and (3) the First Amendment to the U.S. Constitution and the analogous provision of the Nevada Constitution 1 protect TikTok's decisions about how to select, organize, and present third-party user-generated content.

[The Court found that Nevada courts have jurisdiction over TikTok…]

The CDA sr 230 and the First Amendment do not immunize TikTok from the State's NDTPA claims at the pleading stage

Whether the CDA § 230 provides irnmunity is an issue of law that we review de novo, even in the context of a writ petition challenging a denial of a motion to dismiss. Heights of Surnrnerlin, LLC v. Eighth Jud. Dist. Ct., 140 Nev., Adv. Op. 65, 556 P.3d 959, 964 (2024) (observing, in the context of considering whether a federal act immunized a defendant from

liability, that Nevada appellate courts review legal questions raised in writ petitions de novo). We similarly review de novo a district court's decision on a motion to dismiss under NRCP 12(b)(5). Nelson v. Burr, 138 Nev. 847, 850, 521 P.3d 1207, 1210 (2024). "Nevada is a notice-pleading state; thus, our courts liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party." W. States Constr., Inc. v. Michoff, 108 Nev. 931, 936, 840 P.3d 1220, 1223 (1992). The State's NDTPA claims must be dismissed for failure to state a claim "only if it appears beyond a doubt that [the State] could prove no set of facts, which, if true, would entitle it to relief." Buzz Stew, LLC, 124 Nev. at 228, 181 P.3d at 672.

The CDA § 230 provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Congress passed the CDA "to promote the continued development of the Internet and other interactive computer services." HorneAway.com , Inc. v. City of Santa Monica, 918 F.3d 676, 681 (9th Cir. 2019) (quoting 47 U.S.C. § 230(b)(1)). The statute effectively immunizes website operators from liability for third-party content, material, or speech that is posted on the operator's website. Fair Hous. Council of San Fernando Valley v. Roornrnates.corn, LLC, 521 F.3d 1157, 1162-63 (9th Cir. 2008) (en banc). That immunity extends to claims that seek to hold an internet service provider liable based on its exercise of "traditional editorial functions." Batzel v. Srnith, 333 F.3d 1018, 1031 n.18 (9th Cir. 2003) (internal quotation marks omitted). A defendant is thus immune from state law liability under the CDA § 230 if it is "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider." Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100-01 (9th Cir. 2009).

Pointing to Lernrnon v. Snap, Inc., 995 F.3d 1085, 1092 (9th Cir. 2021), the district court concluded that § 230 of the CDA did not immunize TikTok because the State's complaint did not seek to place TikTok in the shoes of third-party content creators, but rather, the Complaint

> places [TikTok] in [its] own shoes for designing [its] platform in a way that [it] know[s] to be harmful to children and teens, and for making [its] own misrepresentations and material omissions about the safety of [its] platform. [TikTok's] liability in this case does not depend on any of the third-party content posted or distributed

> by [its] platform, but rather the harmful design features of the platform itself. To comply with the duties alleged in the Complaint, {TikTok] would not need to alter any third-party content or otherwise engage in publication activities. Instead, [it] would need to change only its own misstatements, omissions, marketing, platform development, and design decisions.

TikTok claims that designing algorithms and making decisions about the structure and operation of a social media platform inherently entail choices about what content can appear, and those types of choices fall within the purview of traditional publisher functions. TikTok frames the State's allegations about the TikTok platform's design as an argument that sustained viewing of third-party content leads to unhealthy addiction. It contends that the State's misrepresentation claim depends on allegations that TikTok did not do enough to block and remove content, which are core publishing functions.

Those arguments implicate the second and third components of the Barnes test, namely, whether the State's NDTPA claims seek to treat TikTok as a publisher of information provided by third-party users such that the CDA § 230 immunity applies. Barnes, 570 F.3d at 1100-01. Determining whether the Barnes test is met here requires "engag[ing] in a careful inquiry into the fundamental duty invoked by the [State] and determining if it derives from [TikTok's] status or conduct as a publisher or speaker." E,st. of Bride v. Yolo Techs., Inc., 112 F.4th 1168, 1178 (9th Cir. 2024), cert. denied sub norn. Est. of Carson Bride v. Yolo Techs., Inc., U.S. , 145 S. Ct. 1435 (Mar. 24, 2025) (internal quotation marks omitted). In Lemrnon, the case on which the district court relied, the parents of two boys who died in a high-speed car accident sued the maker of Snapchat (Snap), alleging that through Snap's negligent design of the app, it encouraged their sons to drive at dangerous speeds, causing their deaths. 995 F.3d at 1087. The parents alleged that Snap knew or should have known that its "Speed Filter" and reward system design features worked in tandem to incentivize young drivers to drive at dangerous speeds, citing news reports and other accidents linked to the Speed Filter. Id. at 1089-90. On Snap's motion, the trial court dismissed the complaint, finding that the CDA § 230 immunized Snap from liability. Id. at 1090.

The Ninth Circuit reversed the trial court's decision, concluding that the parents' claim did not seek to treat Snap as a publisher or speaker of third-party content because it turned on Snap's design of Snapchat. Id. at 1094. The court reasoned that "[t]he duty underlying such a claim differs

markedly from the duties of publishers as defined in the CDA" because “[m]anufacturers have a specific duty to refrain from designing a product that poses an unreasonable risk of injury or harm to consumers." Id. at 1092. On the other hand, "entities acting solely as publishers—i.e. those that review material submitted for publication, perhaps edit it for style or technical fluency, and then decide whether to publish it—generally have no similar duty." Id. (internal citations and quotation rnarks omitted).

The court held that Snap could have satisfied its duty by taking "reasonable measures to design a product more useful than it was foreseeably dangerous—without altering the content that Snapchat's users generate." Id. The court also determined that the parents' negligent-design claim did not rely on "inforrnation provided by another information content provider," id. at 1094, that "internet companies remain on the hook when they create or develop their own internet content," id. at 1087, and that the boys' interactions with the reward system and Speed Filter induced the dangerous speeding—not the act of publishing the boys' Snaps, id. at 1093. We are persuaded by the reasoning in Lernrnon and conclude that the district court properly applied that decision in rejecting TikTok's CDA § 230 immunity argument. On its face, the State's complaint does not seek to hold TikTok liable for any third-party content that it publishes.

The State's first NDTPA claim under NRS 598.091 targets TikTok's alleged own knowingly false statements and omissions to regulators and the public about young users' safety on the platform. Though the State references problematic third-party content in its complaint—such as TikTok "challenge" trends and videos depicting drugs, sex, and suicide—it does so to support its claims that (1) TikTok made misrepresentations about its enforcement of the platform's community guidelines and the safety measures that TikTok implements and (2) TikTok knows that young users experience mental, physical, and privacy harms due to their compulsive TikTok use. Therefore, consistent with the Barnes analysis, this claim does not trigger CDA § 230 immunity because the State seeks to hold TikTok liable for its own statements and omissions and resulting duties to users with only a tangential relationship to third-party content. See Bride, 112 F.4th at 1179 (reversing a district court decision dismissing a misrepresentation claim based on CDA § 230 immunity because the tech company's own statements to users about unmasking and removing abusive users constituted an "outwardly manifested intention" that created an expectation of safety among users and guardians of young users, thus generat[ing] a legal duty distinct from the conduct at hand" (internal quotation marks omitted)).

As to the State's second NDTPA claim under NRS 598.0923, it explicitly targets the design of TikTok's platform rather than the content of posted videos, alleging that TikTok "willfully committed unconscionable trade practices in designing and deploying" features intended to exploit young users' lack of knowledge or capacity to appreciate the risks inherent in the platform's design. That the complaint's allegations specifically target

the platform's content-neutral design features distinguishes this case from Moody v. NetChoice, LLC, 603 U.S. 707 (2024), a case that TikTok argues supports immunity. In Moody, the Court considered whether state laws restricting social media platforms' control over the ideological mix of third-party speech displayed in user feeds offended the First Amendment. 603 U.S. at 717. The Court explained that "select[ing] and shapring] other parties' expression into their own curated speech products" is a traditional publishing activity subject to protection. Id. at 716-17; see also Barnes, 570 F.3d at 1102 (explaining that "reviewing, editing, and deciding whether to publish or to withdraw from publication" are traditional publisher functions under the CDA § 230). But unlike Moody, this case does not concern restrictive state laws and the State, as the plaintiff, explicitly does not seek to curtail or alter the mix of third-party content that TikTok publishes—it only purports to challenge the design features that TikTok implements to keep users on the platform as long as possible, no matter the type of third-party content that may appear in a user's feed.

That some of these features interact with third-party content does not alter that the State seeks to hold TikTok liable for "violating its distinct duty to design a reasonably safe product," rather than for publishing user content. Lenunon, 995 F.3d at 1092 (emphasis added). Thus, the State's claims arise from TikTok's alleged duty to provide a reasonably safe social media app rather than any failure to edit or remove third-party content. See Doe 1 v. Twitter, Inc., 148 F.4th 635, 645 (9th Cir. 2025) (holding that the CDA § 230 did not immunize Twitter from liability for a design defect based on the platform's lack of a reporting infrastructure for child exploitation material because "Twitter could fulfill its purported duty to cure reporting infrastructure deficiencies without monitoring, removing, or in any way engaging with third-party content"). Therefore, at the motion to dismiss stage, we cannot say that there is no set of facts that, if true, would entitle the State to relief on its NDTPA claims and not be subject to immunity based on the CDA § 230.

For similar reasons, the First Amendment does not bar the State's NDTPA design-based claims as pleaded. We recognize that curating third-party content and moderating that content can amount to protected

expressive activity under the First Amendment, per Moody. 603 U.S. at 718. However, Moody expressly declined to consider how the First Amendment would apply to algorithms and other design features that employ user-interaction data to shape an addictive user experience. Id. at 736 n.5 ("We therefore do not deal here with feeds whose algorithms respond solely to how users act online—giving them the content they appear to want, without any regard to independent content standards."), see also NetChoice, LL,C v. Bonta, 152 F.4th 1002, 1021 (9th Cir. 2025) (recognizing "that some personalized recommendation algorithms may be expressive, while others are not, and that inquiry is fact intensive"). Moreover, the State explicitly disclaims any intent to impose liability based on any content or its curation and thus alleges a claim that does not target expressive First Amendment activity.

We also agree with the district court that the First Amendment does not bar the State's misrepresentation and omission claims, as the First Amendment does not protect inherently misleading commercial speech. Cent. Hudson, Gas & Elec. Corp. v. Pub. Serv. Cornrn'n of N. Y, 447 U.S. 557, 566 (1980). The misleading aspect is key to the State's claim that TikTok misrepresented or omitted information on its website, in its community guidelines, and in presentations to PTAs and the U.S. Congress.

Though TikTok argues that its representations regarding the safety of young users on the platform are protected under the First Amendment as subjective statements of opinion or aspiration, the State points to several affirmative statements that go beyond mere aspiration or opinion, such as statements in the community standards that "[TikTok] do[e s] not allow content that may put young people at risk of exploitation, or psychological, physical or developmental harm," including "child sexual abuse material (CSAM), youth abuse, bullying, dangerous activities and challenges, exposure to overtly mature themes, and consumption of alcohol, tobacco, drugs, or regulated substances." Thus, the State has asserted claims that are not subject to dismissal based on the First Amendment. Accordingly, the district court correctly denied the motion to dismiss because there are facts that could be shown to entitle the State to relief on its NDTPA claims without invoking the protections of the CDA § 230 and the First Amendment.

CONCLUSION

[] The district court [] properly denied the motion to dismiss these claims because the CDA § 230 and First Amendment do not protect TikTok from liability for its own allegedly misleading statements and omissions about safety risks to young users or for allegedly harmful design features that are not based on third-party content or its own expressive activity. Accordingly, we deny TikTok's petition.